

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

Second Appeal No.268/2006

(Sou. Manda w/o Gajanan Taksande Vs. Smt. Mirabai wd/o Nagoba Dhote)

Appeal
Application No.
Writ petition

District :
of 200

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders.

Court's or Judge's orders

Mr. R.M. Ahirrao, Adv. for the appellant.

CORAM : Smt. Vasanti A. Naik, J.
DATED : 25th July, 2007.

Heard Shri Ahirrao for the appellant.

The appellant is the original defendant. A suit was filed by one Mirabai claiming to be the widow of Nagoba Dhote who died on 28/3/1990. It was the case of plaintiff Mirabai that the defendant/ present appellant was the daughter of Nagoba from his first wife. It was the plaintiff's case that both the plaintiff as well as the defendant were the legal heirs of deceased Nagoba and they were entitled to equal shares in the property left behind by Nagoba Dhote. The plaintiff, therefore, sought a decree for partition and separate possession of her share in the suit property.

The claim of the plaintiff was denied by the defendant. It was pleaded by the defendant in her written statement that the plaintiff was not the legal heir of the property left and was, therefore, not

entitled for equal share in the property mentioned in paragraph no.1 of the plaint. It was further pleaded by the defendant that the house property involved in the suit was constructed by the husband of the defendant after the death of Nagoba Dhote. It was further pleaded in the specific pleadings that the plaintiff voluntarily left the house of the defendant two years after the death of Nagoba Dhote and was residing separately and taking crops from the field separately. It was also pleaded that the plaintiff left village Sangoda after some time and started residing at Mandar, Tahsil Wani, at her brother's house. Since, according to the defendant, the plaintiff wanted to give away the properties to her brother and the defendant was not allowing to do so, the suit had been instituted.

In view of the aforesaid pleadings, the trial Court framed the issues. Since the defendant had not specifically denied that the plaintiff was the widow of deceased Nagoba Dhote, the trial Court rightly did not frame the issue in that regard. The trial Court held that Nagoba Dhote was the owner of the field property and not the owner of the house property as pleaded by the plaintiff. The Court held that the plaintiff was entitled to partition and separate possession of her half share in the field property. The Court accepted that the defendant's husband had constructed the house property and,

therefore, Nagoba Dhote was not the owner of the same and the plaintiff could not have claimed half share in the house property. The judgment passed by the trial Court was challenged in an appeal filed by the defendant. The appellate Court, however, by the judgment dated 21/9/2005, confirmed the findings recorded by the trial Court. The appellant has challenged both the judgments in this second appeal.

Shri Ahirrao, the learned counsel for the appellant, submitted that it was incumbent on the trial as well as the appellate Court to have framed an issue about the relationship of the plaintiff with Nagoba Dhote as the defendant had denied that the plaintiff was the legal heir of Nagoba Dhote. According to the counsel for the appellant, the non-framing of such issue would give rise to a substantial question of law as the case of the plaintiff was based on the relationship of the plaintiff with Nagoba Dhote.

I have perused the plaint as well as the written statement. The plaintiff has categorically pleaded that she was the widow of Nagoba Dhote and the defendant was the daughter of Nagoba Dhote from his first wife. The plaintiff then pleaded that she was the legal heir of Nagoba Dhote and was entitled to $\frac{1}{2}$ share in the suit property. It is pertinent to note that the defendant had not denied

the pleading of the plaintiff about she being the widow of Nagoba Dhote. The defendant had not denied the relationship of plaintiff with Nagoba Dhote. However, a general denial about the plaintiff being the legal heir of Nagoba Dhote was made in the written statement. It is further conspicuous to note that in the specific pleading in the written statement, the defendant had categorically stated that the plaintiff was staying with the defendant for a period of two years after the death of Nagoba Dhote and she was separately cultivating her land which was allotted to her share. Since the defendant has not specifically denied the pleadings of the plaintiff that she was the widow of Nagoba Dhote, the aforesaid fact is deemed to be admitted under the provisions of Order VIII Rule 5 of the Code of Civil Procedure. The relationship of the plaintiff with Nagoba Dhote was not only not denied by the defendant, but the defendant went on to plead in the specific pleadings that the plaintiff was staying with the defendant for about two years after the death of Nagoba Dhote and she was given her share in the field property and was cultivating the same for quite a some time.

In the backdrop of the aforesaid position of facts, it cannot be said that it was necessary for the trial Court to frame the issue on the question of relationship of the plaintiff with Nagoba Dhote. The

trial Court rightly did not frame the issue in that regard as it was not a fact asserted by the plaintiff and denied by the defendant. The defendant is deemed to have admitted the fact in view of the provisions of the Code of Civil Procedure.

For the reasons aforesaid, the second appeal is dismissed with no order as to costs.

JUDGE

RMP